No. 17-515

In the Supreme Court of the United States

CNH INDUSTRIAL N.V. &
CNH INDUSTRIAL AMERICA, LLC,
Petitioners,

v.

JACK REESE; JAMES CICHANOFSKY;
ROGER MILLER; GEORGE NOWLIN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Circuit's decision is consistent with *M & G Polymers USA, LLC v. Tackett,* 135 S. Ct. 926 (2015) when it held, for the third time, that CNH contracted to provide vested lifetime retiree healthcare benefits to the Class, applying ordinary contract principles to the contractual language, finding at least an ambiguity as to vesting, and giving effect to the undisputed and extensive extrinsic evidence and admissions that the parties intended to vest the benefits.

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STATEMENT OF THE CASE

A. Factual background

The Respondents are a class of CNH retirees (and their spouses). While employed, the retirees were represented in labor negotiations by the United Automobile, Aerospace and Agricultural Workers of America ("UAW").

CNH and its predecessors[1] entered into a series of collectively bargained agreements ("CBAs") with the UAW, called "Central Agreements." Collectively bargained group insurance benefits were contained in a separate document, the "Group Insurance Plan," and incorporated into the Central Agreements.

For decades, and over the course of several successive Central Agreements, lifetime pension benefits and healthcare benefits were extended to retirees through language similar or identical to that found in the 1998 CBA. App. 1-2. Over many collectively bargained contracts, the meaning of that contract language was reinforced by the parties' conduct and admissions.[2]

Those who repeatedly collectively bargained for the pension and retiree healthcare benefits understood them to be vested, lifetime benefits. Case's Director of Benefits and Practices told retirees in 1971 that the Company would fully cover benefits and that benefits

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[1] CNH refers to CNH and its various predecessors, including J.I. Case and Case.

[2] See Doc. 129 at 5150 to 5163 (Motion for Summary Judgment).

would be in effect for life. *Yolton v. El Paso Tennessee Pipeline Co.*, 318 F. Supp. 2d 455, 469 (E.D. Mich. 2003).[3] Case benefits administrators and managers were told and in turn told retiring employees "that their medical insurance benefits would continue unchanged for their lifetime ..." *Id.* Documents related to various plant shutdown retirement agreements reflect that health insurance benefits "continu[ed] unchanged" "[f]or lifetime." *Id.* Medical insurance cards issued to retirees from Case's Industrial Relations Department in Terre Haute, Indiana contain the words "Lifetime" or "Lifetime Coverage." *Id.* Benefits information issued to employees upon retirement stated that the retiree and spouse were entitled to full health insurance coverage and that if the retiree predeceased his wife, her coverage "would continue as before" and would only change if she remarried. *Id.* at 469-470. Further, under a section entitled "Spouse's Benefits," the summary provided to the employee states that "In the event that you should die before your spouse and a spouse's option was spplied [sic] for, she will receive 55% of your pension for her lifetime along with the insurance which was mentioned previously." *Id.* at 470. Numerous other retirees and surviving spouses were told by Case benefits representatives that they would receive post-retirement lifetime health insurance coverage fully paid for by the company. *Id.* Some of their affidavits

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[3] *Yolton* was a parallel lawsuit involving the same claims against another successor in interest. *Yolton* and *Reese* share the same bargaining history and same operative language vesting retiree healthcare benefits.

include the accompanying documentation promising fully funded health insurance for life. *Id.*[4]

The parties brought their understanding of the meaning of their contract language with them each time they sat at the bargaining table and repeatedly adopted the same language into a new Central Agreement.[5]

In 1998, the identical, serially adopted language meant what CNH historically and repeatedly said it meant: that the class would receive retiree medical benefits for life. In the incorporated 1998 Group Benefit Plan, the language was, again, virtually unchanged. App. 3-5.

Although CNH references itself as a "new entity" entering into negotiations after 1994, the same negotiators made the same promises throughout the 1990s, regardless of any change in corporate form. Management's negotiating team signed the CBAs: Tim Haas was CNH's Manager of Benefits and Director of Benefits from 1990. Haas identified Paul Crist as the person who developed negotiation strategy around benefits, including for retirees in 1990. Crist negotiated

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[4] *See also* Doc. 129 at 5150 to 5167 (Motion for Summary Judgment) for a description of the evidence, which has never been contested by CNH, of the parties' express understanding that the retiree healthcare benefits were promised for life.

[5] CNH selectively cites to the record below, ignoring the entirety of the parties' collective bargaining history. CNH also repeatedly references contracts that "expire" are "superseded" or end on a "date certain." CNH's linguistic supposition that *all of the terms* "expire" at the end of a particular CBA is not only logically circular but begs the very question it asks this Court to decide.

in 1995 and 1998 as well. In 1990,[6] 1995 and 1998, the exact same language was adopted to vest pension benefits and retiree healthcare benefits. Doc. 129-11 at 5168 to 5186 (Signatures) and Doc. 129-33 at 5566 to 5585 (Haas Affidavit).

Further evidencing the parties' intent that the retiree healthcare obligations continued beyond the expiration of the contract, the parties agreed to place caps on its obligations for retiree healthcare in 1990 and 1993. App. 3 (Excerpts from 1993 Extension Agreement, Letter of Agreement). During the 1995 negotiations, the UAW and Case agreed to extend the effective date of the caps until January 1, 1999.[7] To be

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[6] In the 1990 negotiations, Case agreed to provide healthcare benefits for a surviving spouse of a disability retiree who, through a quirk in the pension plan, was not receiving a survivor pension. After the negotiations, Case wrote to this surviving spouse, telling her she would have the "same [healthcare benefits] as those provided to other surviving spouses of deceased retirees" and she would "now have those coverages for your lifetime." Case copied Jack Reese, the UAW's chief negotiator, confirming that Case had complied with its agreement. Doc.153 at 6737 (Devine Letter). In 1991 through 1992, Case negotiated with the UAW for voluntary early retirement benefits to reduce its work force, Case and the UAW held mass meetings with prospective retirees. At early retirement seminars on November 18, 1991 and March 12, 1992, Case passed out sheets outlining the benefits retirees would have under the program. As to surviving spouses, Case wrote that **"the surviving spouses will continue all medical, dental, vision, etc. coverages for life."** Doc. 129-10 at 5758 to 5762, 5767 and 5775 (Graham Deposition and Exhibits) (emphasis added).

[7] The 1990 Group Benefits Plan was effective from June 2, 1990 through October 2, 1993. The 1993 Extension Agreement extended the 1990 Central Agreement through February 5, 1995. Doc. 273-7 at 10129 and Doc. 273-8 at 10132.

clear, the caps *did not become effective until after the expiration* of the 1990 Central Agreement and the 1993 Extension Agreement. During the 1998 negotiations, Case agreed to eliminate the caps at the UAW's insistence, thereby agreeing to provide uncapped benefits. Doc. 273-51 at 10599 to 10632 (Tentative Agreement).

CNH overstates the importance of the changes made in 1998 to the healthcare benefits. Those changes were designed to address a problematic[8] healthcare plan and to *improve benefits*. Improving benefits is not inconsistent with vesting. As Judge Sutton stated in *Reese I*, improvement of benefits would not "break any promises to provide irreducible benefits for life." *Reese I*, at 325.

During the 1995 negotiations, Case proposed substituting a managed healthcare plan for the Indemnity Plan for active employees and current retirees. In 1995, the UAW and Case agreed to retain the Indemnity Plan as it then existed for active employees and current retirees. However, the UAW and Case also agreed that the Case Managed Care Network Plan ("1995 Network Plan") would be

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[8] From before 1974 and until 1998, the basic healthcare plan for Case hourly active employees and retirees was the Case indemnity healthcare plan ("Indemnity Plan"). Disputes between the UAW and Case about "reasonable and customary" fees and the "hold harmless" provision of the Indemnity Plan were common leading up to 1998 negotiations. Doc. 273-13 at 10275 to 10347 (Dispute Documentation).

mandatory for newly hired employees and *optional*[9] for existing employees and current retirees. Tentative Agreement, Doc. 273-16 at 10374 and 10380. Many employees and retirees opted for the Managed Care Plan in lieu of the disfavored Indemnity Plan.

During the 1998 negotiations, the parties bargained over healthcare benefits. Ultimately, Case and the UAW agreed to replace the Indemnity Plan with a "high quality Case Managed Care Health Network Plan (PPO design)" for current active employees and retirees. Doc. 273-51 at 10614 (Benefit Detail). This Court, in *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) required pensioners' consent to a reduction in vested benefits. *Improvements* to vested benefits do not require consent. *Reese I* at 325, *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185 (1971). These changes

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[9] CNH claims that the Letter of Understanding Re: Cost of Healthcare Coverage contemplated that there would be no "additional employee contributions ... over the term of the 1998 labor agreement" at p. 4 and, therefore contributions could be required when the agreement expired. Very importantly, **this quote does not reference contributions to the company-sponsored plan**. Active employees and retirees could upgrade their benefits by opting for plans other than the company-sponsored basic plan. The *basic plan*, or the Network option, required no contribution, whereas the *optional* plans, or non-Network options, required contribution to premium payments, *if* those plans exceeded the employer's cost for the *basic plan*. **The quoted reference is to contributions for the *optional plans*** over the term of the 1998 labor agreement. There was never any contribution for the basic plan. *Reese v. CNH Glob. N.V.*, No. 04-70592, 2011 WL 824585, at *8 (E.D. Mich. Mar. 3, 2011) (citations omitted).

were uniformly considered improvements over the Indemnity Plan.[10]

CNH overstates the importance of the "National and State Health Insurance Initiatives" which addresses the situation where federal or state governments provide healthcare benefits that are also provided under the CBA. While the letter allows modifications to the agreement in the event that a government provides benefits that duplicate the vested retiree healthcare benefits, the modification cannot result in a reduction in benefits. The letter is evidence that the benefits can be improved but not reduced, and is therefore consistent with vesting.[11]

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[10] In a July 1998 newsletter Case announced "**Important Improvements to Your Health Care.**" Case stated that "union negotiators and Case management have worked together to advance your health care benefits" and that: "This newsletter focuses on improvements to your health care benefits" and describes the "improved managed care system" beginning September 1, 1998. Doc. 273-65 at 10753 to 10757 (Newsletter). In the second Benefit News for Case Union Employees, Case informed retirees about the "improved managed care health care system" effective September 1, 1998 and that "[y]our other benefits are also improving." Doc. 273-66 at 10758 to 10766 (Newsletter).

[11] CNH contends that it modified the benefits to the Class, unilaterally, by requiring Medicare-eligible Retirees to participate in the Medicare Part D prescription drug program effective in 2015. The Class disagrees with this characterization of the events, specifically that Part D created a duplicative benefit and that the National and State Health Insurance Initiatives letter applied. The Class did concede that the "current law of our case" allowed CNH to modify benefits to reduce plan costs so long as the benefits remained commensurate with the benefits provided under the current plan. Doc. 425-12 at 15179-15180. (Brault Letter).

B. Procedural history

This conflict began when CNH filed a declaratory action asserting that the retiree healthcare benefits promised to the Class were not vested.[12] In response, this action was properly filed,[13] seeking a declaratory judgment that the retiree healthcare benefits were vested.

1. Prior Proceedings

In 2007, the district court granted summary judgment to the Class and denied CNH's motions for summary judgment. After analyzing the language of the CBA and relevant extrinsic evidence, the district court concluded:

> [T]he plain language of the relevant agreements, as further supported by extrinsic evidence, demonstrates Case's and the UAW's intent to grant lifetime retiree health insurance coverage to retirees and surviving spouses of retirees who are eligible for or are receiving a pension.

Reese v. CNH Glob. N.V., No. 04-70592, 2007 WL 2484989, at *7 (E.D. Mich. Aug. 29, 2007).

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[12] *CNH Am. LLC v. UAW*, No. 04-C-0148, 2004 WL 5627648 (E.D. Wis. Aug. 3, 2004).

[13] The selection of venue was not based upon forum shopping, as CNH states, but rather, because a companion case, the *Yolton* matter, was pending before Judge Duggan in the Eastern District of Michigan and it was efficient for this matter, involving identical contracts, to be heard in the same Court.

CNH filed its ***first appeal***. On July 27, 2009, the Sixth Circuit affirmed that the retiree healthcare benefits vested for life. *Reese v. CNH America LLC*, 574 F.3d 315, 327 (6th Cir. 2009) (*Reese I*). After finding the benefits to be vested for life, Judge Sutton, who authored the opinion, then posed the question "[w]hat does vesting mean in this context?" Judge Sutton focused on the 1998 negotiations where Case and the UAW agreed to substitute the Case Managed Network Plan for the existing Indemnity Plan for active employees and the small group of existing retirees who had retired after July 1, 1994. Judge Sutton examined the 1998 CBA and, drawing all inferences in favor of CNH, cited selected extrinsic "clues" that *could* support an interpretation that the vested benefits of retirees could be "change[d] from CBA to CBA." 574 F.3d at 325. According to the court, any such modifications must be "reasonably commensurate" with the benefits provided in the 1998 CBA, "reasonable in light of change in health care" and "roughly consistent with the kinds of benefits provided to current employees." *Id.* at 326. The court remanded the case to "decide how and in what circumstances CNH may alter such benefits - and to decide whether it is a matter amenable to judgment as a matter of law or not." 574 F.3d at 327.

Plaintiffs filed a Petition for Panel Rehearing, arguing that the court had decided an issue – what vesting means in the context of the 1998 negotiations – that CNH had not raised either before the district court or on appeal. Plaintiffs also challenged the determination that there had been "material alterations" to health benefits for existing retirees in 1998, which was the predicate for this Court's conclusion that future changes could be made.

Plaintiffs cited record facts showing that the 1998 negotiations resulted in substantial *improvements* to the benefits provided for both existing and future retirees, noting that Judge Sutton had acknowledged that the *improvement* of benefits would not "break any promises to provide irreducible benefits for life." *Reese I*, at 325.

On September 24, 2009, the panel denied Plaintiffs' motion for reconsideration. Judge Sutton filed a published concurrence. *Reese v. CNH Am. LLC*, 583 F.3d 955 (6th Cir. 2009).[14] Judge Sutton instructed that, on remand, the parties were free to develop evidence that would show either 1) that "plaintiffs should win as a matter of law because the prior retirees either approved of the changes or they did not diminish the nature of the benefit package that existed upon retirement;" *or* 2) "that CNH should be allowed to make reasonable modifications to the health-care benefits of retirees, consistent with the way the parties have interpreted and implemented prior CBAs containing similar language." *Id.*

On remand, Plaintiffs argued that the 1998 negotiations had improved (and had not diminished) retiree healthcare benefits and, therefore, Plaintiffs should, in Judge Sutton's words "win as a matter of law." Plaintiffs also argued that any future modifications to retiree healthcare benefits could only

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[14] Judge Sutton responded to Plaintiffs' protest of the court's assessment of the factual record, stating that it "overlooks the posture of the case - summary judgment - in which all inferences run in favor of the party that lost below: CNH." *Id.* at 956.

be made, as in the 1998 negotiations, by the agreement of CNH and the UAW, and not unilaterally.

The district court granted Plaintiffs' motions for summary judgment and denied CNH's motions. *Reese v. CNH Glob. N.V.*, No. 04-70592, 2011 WL 824585, at *10 (E.D. Mich. Mar. 3, 2011). After an extensive review of the evidence presented, the court held that the 1998 negotiations had resulted in *improved* healthcare benefits for existing retirees. The court concluded, viewing the record before it in a light most favorable to CNH, that there was "no evidence that the UAW and CNH (or Case previously) ever negotiated a *reduction* of those benefits." The district also concluded that, to the extent CNH can make future changes to retiree health care benefits, it may do so "only through an agreement with the UAW."

On March 16, 2011, CNH filed its ***second appeal***. On September 13, 2012, Judge Sutton again authored the opinion for the majority, *Reese v. CNH America LLC,* 694 F.3d 681 (6th Cir. 2012) (*Reese II*). Without mentioning the 2009 concurrence, Judge Sutton stated that the district court had "misread" *Reese I* and erred in addressing the issue of whether benefits had been improved or diminished in the 1998 negotiations. Instead, Judge Sutton stated that, in *Reese I*, the court "recognized that CNH could alter [benefits] on its own, not as part of a new collective-bargaining process," so long as the changes were "reasonable." The majority remanded the case to the district court for it to "take evidence on" several questions around the reasonableness of the proposed changes. *Reese II* at 684-686.

Plaintiffs and CNH filed cross motions for summary judgment on the issue of the reasonableness of the changes proposed by CNH. These motions were pending when this Court decided *Tackett*. CNH then filed a motion requesting summary judgment under *Tackett*.

2. District Court Proceedings

On September 28, 2015, Judge Duggan issued an opinion, holding that he was "constrained" by *Tackett* to enter summary judgment for CNH. Plaintiffs filed a Motion for Reconsideration, which the district court granted on November 9, 2015. Pet. App. 40. The court found that its earlier decision was hasty and failed to consider and apply ordinary contract principles, without inferences. Proper analysis resulted in a finding that the contract language was at least ambiguous and that the extrinsic evidence overwhelmingly supported a finding that the parties intended to vest the benefits. The district court again entered judgment in favor of the Class.

3. Circuit Court Proceedings

On November 10, 2015, CNH filed its **third appeal**. Judge Gibbons, writing for the majority, found that the retiree healthcare benefits promised to the Class were vested, lifetime benefits. Pet. App. 1. Judge Donald concurred in the vesting determination. Pet. App. 22. Judge Sutton dissented. CNH's Petition for En Banc Review was denied. Pet. App. 24.

The majority acknowledged that *Tackett* changed Sixth Circuit law when it abrogated the *Yard-Man*[15] inference in favor of "ordinary contract principles" when reviewing collective bargaining agreements. Judge Gibbons went on to consider which of the contract principles created by the *Yard-Man* line of cases impermissibly relied upon inferences. Pet. App. 7. The Sixth Circuit reviewed the surviving principles in the context of its decision in *Tackett III*, ultimately concluding that a case by case review of facts is needed to determine whether the presence of a durational clause cures ambiguity as to the duration of benefits or whether when read in conjunction with the whole instrument, ambiguity is furthered. Judge Gibbons wrote: "We cannot, and should not, presume that the general-durational clause here says everything about the parties' intentions." Pet. App. 11.

The Court below reconciled *Tackett*, noting "[t]here is surely a difference between finding ambiguity from silence and finding vesting from silence." Pet. App. 12. The Court recognized that the cardinal principle of contract interpretation is to ascertain the parties' intentions. While an inference forecloses that inquiry, finding ambiguity opens it. Giving dispositive weight to the general durational clause would create an opposite inference in favor of the employer, which *Tackett* does not permit. Pet. App. 12.

The Sixth Circuit applied *Tackett* and found that silence as to the duration of retiree healthcare benefits, combined with those benefits' coupling to pensioner status and their segregation from other entitlements in

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[15] *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983).

the CBA, overcomes any presumption that the general-durational clause should govern. To find otherwise would ignore evidence taken from the whole instrument, in contravention of ordinary contract principles, and in contravention of the most important of those – determining the parties' intent. Pet. App. 12-13.

After finding the contract to be ambiguous, the Sixth Circuit then examined the extrinsic evidence, which plainly indicates the parties intended to vest the benefits for life. Pet. Ap. 13. The district court was affirmed.

REASONS FOR DENYING THE PETITION

Less than three years ago, in *Tackett,* this Court directed courts to construe collectively bargained promises using "ordinary principles of contract law consistent with federal labor policy."

The Sixth Circuit applied those principles below, shorn of inference, to find for the third time that CNH promised vested, lifetime benefits to this class of retirees. The vesting question, on these facts, was correctly decided. The majority applied ordinary contract principles to find that the contract was ambiguous and that extrinsic evidence proved the parties' intent to contract for retiree healthcare benefits that were vested for life.

Fact-specific inquiries will naturally conclude differently, depending upon those facts. The Sixth Circuit decisions are the natural product of ordinary contract principles applied to varied and complex facts. There is no compelling reason for this Court to review them.

The Courts of Appeal are now directed through *Tackett* to apply ordinary contract principles and not to use inferences for or against vesting. CNH argues that there is an intra-circuit split, but it relies primarily on cases decided before *Tackett*. It is premature to conclude that the Courts of Appeal require guidance on how to apply *Tackett*. The two appellate cases decided in other Circuits, do not indicate a conflict.

A. The ordinary contract principles relied upon below to find, for the third time, that these benefits are vested are consistent with this Court's decision in *Tackett*.

This case was correctly decided. The Sixth Circuit accepted that *Tackett* abrogated the *Yard-Man* inference. The Court carefully examined the *Yard-Man* line of cases to determine what, if any, contract principles found in those cases impermissibly relied on an inference in favor of vesting.

The Sixth Circuit noted these ordinary principles of contract law which survived the abrogation of *Yard-Man*:

- [A]s with any other contract, the parties' intentions control.
- Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.
- Although a court may look to known customs or usages in a particular industry to determine the meaning of a contract, the parties must prove

> those customs or usages using affirmative evidentiary support in a given case.

Pet. App. 8-9, citing *Tackett III,* 811 F.3d at 208 (6th Cir. 2016) citing *Tackett*, 135 S. Ct. at 933-937.

The Sixth Circuit went on to acknowledge the principles highlighted in Justice Ginsberg's concurrence:

- Under the cardinal principle of contract interpretation, the intention of the parties, to be gathered from the whole instrument, must prevail.
- [W]hen the contract is ambiguous, a court may consider extrinsic evidence to determine the intentions of the parties.... [F]or example, the parties' bargaining history.
- No rule requires "clear and express" language in order to show that parties intended health-care benefits to vest.
- Constraints upon the employer after the expiration date of a collective-bargaining agreement ... may be derived from the agreement's "explicit terms," but they may arise as well from implied terms of the expired agreement.

Pet. App. 9, citing *Tackett III* at 208–09, citing *Tackett*, 135 S. Ct. at 937–938 (Ginsburg, J., concurring)).

In *Tackett*, Justice Ginsberg also stated: "a provision stating that retirees 'will receive' health-care benefits if they are 'receiving a monthly pension' is relevant to [the vesting] examination." 135 S. Ct. at

938. Applying these principles to relevant evidence, the panel majority correctly found that the contract language is ambiguous.

Here, the parties used identical language to vest pension and healthcare benefits, knowing that the obligation to provide pension benefits would not end at the expiration of the agreement. Also, the retiree healthcare benefits provisions of the contract were set forth, fully, in a separate section, apart from the provisions applicable to benefits for current employees. Additionally, the contract carved out certain benefits and stated that those coverages ceased at a time different from the contract expiration.[16]

The Sixth Circuit concluded that a plausible reading of the contract language is that so long as a retiree is eligible for a pension (for life), he is eligible for retiree healthcare benefits without contribution.

Finding ambiguity on these facts does not offend the mandate that vesting not be inferred from silence because there is no inference. Rather, facts – without inference – supported a finding of ambiguity.

Tackett does not instruct that facts which formerly supported an inference are, post-Tackett, to be ignored.

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[16] The majority below did not discuss additional contract facts that support a finding of ambiguity: The caps letters. The parties understood the obligation to provide retiree healthcare benefits extended beyond the contract term. Otherwise, there would be no point in placing a contractual cap on that obligation or in removing an existing cap for these retirees. The decision below also did not address the latent ambiguities created when the parties incorporated exact language used from prior agreements. *UAW v. Kelsey-Hayes*, 854 F.3d 862 (2017).

Those facts can inform a finding of ambiguity. While unambiguous contract language is generally interpreted without resort to extrinsic evidence, it need not be interpreted in a vacuum; the underlying goal in interpreting a contract is to ascertain the intent of the parties, and the surrounding circumstances when the parties entered the contract, among other relevant considerations, may well shed light on that intent. II Williston on Contracts § 30:6 (4th ed.) (footnotes omitted) cited in *Tackett* at 933. Indeed, "[f]inding an ambiguity from tying allows a court to explore the extrinsic evidence to discover what the parties actually intended." Pet. App. 12.

CNH bases its appeal to this Court upon Judge Sutton's dissent. CNH and the dissent take an overly narrow view of the holding in *Gallo v. Moen Inc.*, 813 F.3d 265 (6th Cir. 2016), cert. denied 137 S. Ct. 375 (2016), one that would nullify the portion of *Tackett* that allows a finding of ambiguity despite the existence of a "general durational clause." CNH argues that rigid adherence to the principles expressed in *Tackett* require this Court to ignore the historical meaning of the language, the admissions of CNH regarding what the language means, the decades of conduct shaped by the promise, and the ambiguities of the contract. CNH would eschew all the record evidence, in favor of a requirement of "clear and express" vesting language, which it claims would change the benefits at issue here from being unambiguously "vested" to unambiguously "not vested."[17]

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[17] Here, the district court found, twice, that the benefits were unambiguously vested on the face of the contract. The Sixth Circuit affirmed that aspect of the trial court's decisions, twice.

Essentially, CNH argues that *Tackett* created a reverse *Yard-Man* presumption – that a general durational clause in a contract – regardless of the parties' intentions, precludes a finding of vesting. This position is contrary to the directive to analyze the vesting question without resort to inferences.

Ambiguity opens the analysis to extrinsic evidence of the parties' intent. Once extrinsic evidence is reached, there can be no doubt of the intentions of the parties. Here, the evidence is overwhelming and unequivocal that CNH intended to vest retiree healthcare benefits and CNH never attempts to argue otherwise. Instead, CNH wholly ignores the record evidence which indisputably demonstrates the parties' intent.

Vesting, here, is fully anchored in this Court's decision in *Tackett*. The danger of the *Yard-Man* inference was its dispositive resolution of the question of vesting without consideration of intent evidence. The lower court recognized the difference between "finding ambiguity from silence and finding vesting from silence" Pet. App. 11. The extrinsic evidence may show that the parties did not intend the benefits to vest. Or, as in this case, it could demonstrate that the rights had vested. Pet. App. 13-14. This fact-based analysis the Sixth Circuit employed is exactly what *Tackett* commands.

Post-*Tackett*, the district court reassessed as directed and found that, shorn of inferences, the contract language was ambiguous. The Sixth Circuit affirmed.

B. The array of decisions in the Sixth Circuit following *Tackett* are the natural result of the application of *Tackett* to complex and varied facts, not a failure to correctly apply *Tackett*.

CNH is wrong in asserting that there is a direct conflict within the Sixth Circuit. The differing facts in the post-*Tackett* cases are sufficient to explain the differing outcomes.

The Sixth Circuit's discussion of *Tackett* and *Tackett III* in *UAW v. Kelsey-Hayes Company*, 854 F.3d 862 (6th Cir. April 20, 2017) is consistent with the *Tackett* analysis. The *UAW v. Kelsey-Hayes* court concluded:

> ... overruling the *Yard-Man* inference did "not preclude the conclusion that the parties intended to vest lifetime benefits for retirees." The Court's language repeatedly emphasized that a court should look to ordinary contract interpretation, remove any thumb on the scale in either direction, and look to the intent of the parties in the instant case.
>
> On remand [in *Tackett III*], we noted a non-exhaustive list of contract principles to apply when interpreting the duration of healthcare benefits in a CBA. First and foremost, *Tackett III* emphasized that "[a]s with any other contract, the parties' intentions control." This was highlighted in particular by citing Justice Ginsburg's concurrence: "Under the cardinal principle of contract interpretation, the intention of the parties, to be gathered from the whole instrument, must prevail."

Id. (citations omitted).

The Sixth Circuit reiterated the following from *Tackett III*:

> [W]hile the Supreme Court's decision [in Tackett] prevents us from presuming that "absent specific durational language referring to retiree benefits themselves, a general durational clause says nothing about the vesting of retiree benefits," we also cannot presume that the absence of such specific language, by itself, evidences an intent not to vest benefits or that a general durational clause says everything about the intent to vest.

Id. at 867 (quoting *Tackett III*, at 811 F.3d at 209).

Gallo recognized that ordinary principles of contract law did not require blind adherence to a termination date:

> *Tackett* does not create [a clear-statement rule]. It tells courts to apply "ordinary principles of contract law"—identifying relevant principles in this setting along the way—and tells courts to follow those principles where they lead. . . . In overruling *Yard-Man*, in short, *Tackett* does not create a clear-statement rule in the other direction. It instead eliminates the use of inferences and implications not grounded in "ordinary principles of contract law" and explains the kinds of tools properly deployed in this setting.

Gallo, 813 F.3d at 274 (citing *Tackett*, 135 S. Ct. at 933).

The *Gallo* panel's rejection of a clear-statement requirement is entirely consistent with the unanimous Sixth Circuit panel ruling in *Tackett III*, 811 F.3d 204, issued prior to the divided *Gallo* case. As in *Gallo*, the Sixth Circuit in *Tackett III* recognized that the Supreme Court "declined to adopt an 'explicit language' requirement in favor of companies:"

> [T]he Supreme Court's decision prevents us from presuming that "absent specific durational language referring to retiree benefits themselves, a general durational clause *says nothing* about the vesting of retiree benefits," we also cannot presume that the *absence* of such specific language, by itself, evidences an intent *not* to vest benefits or that a general durational clause says *everything* about the intent to vest.

811 F.3d at 209.

Although *Gallo* found the absence of contract language reflecting a commitment to "provide unalterable healthcare benefits to retirees and their spouses for life" to be a critical starting point, it did not hold that the absence of such specific language or the presence of a general durational clause was dispositive—such a holding would have been plainly at odds with *Tackett* and *Tackett III*. Rather, *Gallo* relied upon a number of other factors present in *Gallo* but absent in this case, and, moreover, made clear that its holding was specific to "this set of contracts." *Gallo*, 813 F.3d at 274.

In *Cole v. Meritor*, 855 F.3d 695 (6th Cir. 2017) (*Cole II*), decided on the same day as the decision below, the Sixth Circuit determined that retiree healthcare

benefits were not vested. In that case, the collective bargaining agreement stated that the healthcare benefits would last "until the termination of the National Agreement." On its facts, the Court found this to be a clear statement that the general-durational clause was intended to govern retiree healthcare benefits, therefore tying a benefits promise to the receipt of a pension did not result in ambiguity.

In *UAW v. Kelsey-Hayes Co.*, 854 F.3d 862 (6th Cir. 2017), the Sixth Circuit found ambiguity in the contract which provided for retiree healthcare "for life" and ultimately determined that the benefits were vested, distinguishing *Gallo* on its facts.

Petitions for en banc review were denied in the trio of retiree healthcare benefits cases decided on April 20, 2017. See *UAW v. Kelsey-Hayes Co.*, 872 F.3d 388 (6th Cir. 2017). While positions varied as to the denial of en banc review, Judge Gibbons found that the differences in the Sixth Circuit decisions were borne of differences in fact. She also found that the only path to conflict is an overly restrictive reading of *Tackett*, using *Gallo* as an example. Judge Gibbons explained:

> If *Gallo* is regarded as simply another case whose resolution depended on examination of a factual record and application of old and tested contract construction principles, there is no conflict at all among our cases. The only tension arises from viewing *Gallo* as more than a factual precedent and making it a legal precedent for dissimilar cases. ... *Gallo* by its terms does not have the meaning suggested by the dissents in *Kelsey-Hayes* and *Reese* but is merely a case

> where the contract was unambiguous and did not vest benefits for life.

Kelsey-Hayes, 872 F.3d 388, 389 (6th Cir. 2017).

The Sixth Circuit is uniformly following *Tackett*, case by case. In *Watkins v. Honeywell Int'l Inc.*, No. 17-3032, 2017 WL 5163221, at *1 (6th Cir. Nov. 8, 2017), the Sixth Circuit found that this language: "For the duration of this Agreement, the Insurance Program shall be that which is attached hereto, hereinafter referred to as the Program," was not patently ambiguous.

In *Serafino v. City of Hamtramck*, No. 16-2370, 2017 WL 3833206 (6th Cir. Sept. 1, 2017) the Sixth Circuit explicated its new, post-*Tackett* approach to retiree healthcare benefits. It found that all of the contracts at issue therein contained unambiguous general-durational clauses that defeated vesting, specifically distinguishing the decision below based upon facts, at *5.

In *Watkins*, the Sixth Circuit also specifically distinguished this case based upon facts, 2017 WL 5163221 at *6. Judge Cole, writing for the unanimous panel, surveyed the decisions since *Tackett* and reconciled the holdings in *Gallo, Cole, Kelsye-Hayes,* and the decision below.

The district courts are following the Sixth Circuit's lead: *Zino v. Whirlpool Corp.*, No. 5:11CV1676, 2017 WL 3219830, at *5 (N.D. Ohio July 27, 2017), *Fletcher v. Honeywell Int'l, Inc*, No. 3:16-CV-302, 2016 WL 6780020, at *8 (S.D. Ohio Nov. 15, 2016), *Sloan v. Borgwarner, Inc.*, No. 09-CV-10918, 2016 WL 7107228, at *13 (E.D. Mich. Dec. 5, 2016), *Cole v. Arvin-Meritor,*

No. 03-73872, 2017 WL 5386598, at *3 (E.D. Mich. Nov. 14, 2017).

These individualized assessments are what *Tackett* requires. That the results are varied speaks to the differing fact patterns, not a pervasive misapplication of this Court's decision in *Tackett*.

C. There Is No Evident Conflict Among the Circuits.

In his dissent, Judge Sutton listed a number of cases for the proposition that there is an intra-circuit split of authority on the issue of vesting. CNH relies upon those cases in its petition. Pet. 18. Because all of those cases preceded this Court's decision in *Tackett*, it cannot be evidence of a split generated by *Tackett* or the Sixth Circuit's reading of *Tackett*. To the extent there was a pre-*Tackett* split, that issue was addressed by *Tackett*.

Since the decision in *Tackett* there have been only two vesting cases decided in circuits other than the Sixth citing *Tackett*: *Groves v. Johnson Controls, Inc.*, 694 Fed. Appx. 864 (3rd Cir. 2017) (unpublished) and *Barton v. Constellium Rolled Products-Ravenswood, LLC*, 856 F.3d 348 (4th Cir. 2017).[18]

In *Groves*, the Third Circuit considered whether it's previous rule requiring vesting to be "stated in clear and express language" survived this Court's decision in

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[18] The Seventh Circuit, in *dicta*, noted *Tackett* reset the law of the Circuit – that courts should not use a presumption for or against vesting. *Underwood v. City of Chicago, Ill.*, 779 F.3d 461, 462-463 (7th Cir. 2015).

Tackett, but reserved that question for the future.[19] It found, applying traditional rules, that a reservation of the right to adopt, modify or terminate benefits prevented vesting, despite language that the retiree healthcare benefits would be continued "until death." This decision is not in conflict with Sixth Circuit jurisprudence because a reservation of rights clause in the contractual document would, in the Sixth and likely every other Circuit, be unambiguous evidence that the benefits were not vested. Indeed, in *Gallo*, there was a similar "reservation-of-rights clause that evidenced an intent not to vest" at 270.

In *Barton*, the Fourth Circuit recognized an explicit durational clause in finding that the benefits were not vested under *Tackett*: "such benefits shall remain in effect for the term of this 2010 Labor Agreement" at 350. This finding is not in conflict with the Sixth Circuit fact-driven approach. Indeed, the operative facts and outcome are similar to those in *Cole II*, supra.

CNH contends that the decision below and in *Groves* and *Barton* constitute an intra-circuit split. The Class disagrees. These cases can be harmonized through fact analysis. That only two such cases have been decided indicates that even if there were a

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[19] CNH and proposed amici curiae have advocated below for a "clear and express" rule. However, such a rule is not supported by ordinary contract principles. Instead, it is a presumption in favor of employers and against vesting, contrary to the directive in *Tackett* to free the analysis of inferences and revert back to contract law. Based upon this Court's decision, the Circuit Courts of Appeal that previously relied upon such a rule will be required to revisit the analysis as the issues sharpen through real controversy and rise from the trial courts for appellate review.

conflict, that conflict has not matured into one that merits review.

CONCLUSION

CNH's petition for writ of a certiorari should be denied.

Respectfully submitted,

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